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DEVELOPMENT & COMMERCIAL BANK BHD.

v.

BRIMAL SDN. BHD. & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR

ZAKARIA YATIM J

b

[CIVIL SUIT NO. C548 OF 1985]

22 OCTOBER 1990

c

NEGOTIABLE INSTRUMENTS: *Bills of Exchange - Dishonour - Holder in due course - Validity of bill - Acceptance and dishonour - Capacity to bring action - Requirement of notice of dishonour - Proper party to be notified - Defences available to defendant - Bills of Exchange Act 1949, ss. 2, 3(1), 38(a), 47, 48.*

CIVIL PROCEDURE: *Action on bills of exchange - Entitlement to summary judgment - General rule - Cross-claims and defences not allowed - Limited defences - Fraud, illegality, failure of consideration - Rules of the High Court 1980, O. 14.*

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The defendant D was an acceptor of a bills of exchange dated 21 March 1983 (the said bill) for a sum of RM255,000, drawn by OEI for maturity on 18 August 1983 and endorsed by OEI to the plaintiffs, D & C.

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D & C claim that D failed to pay a certain sum (the said sum) when the said bill was presented for payment. D contended firstly that D & C did not have capacity or title to bring this action as plaintiff, secondly that it was not given any notice of dishonour of payment under the provisions of the Bills of Exchange Act 1949 (the said Act) and thirdly that its liabilities under the said bill had been discharged by subsequent payments made to OEI.

This is D & C's appeal against the refusal of the Senior Assistant Registrar to enter final judgment against D.

Held:*f*

[1] It is evident from the note of protest signed by a notary public that the defendant dishonoured the said bill when the said bill was presented to it for payment.

[2] Under s. 48 of the Act, the plaintiff is only required to give notice of dishonour to the drawer of the bill.

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[3] Section 38(a) of the Act empowers the holder of the bill to sue in his own name and as D & C is the holder of the said bill as defined in s. 2 of the Act, D & C is entitled to sue D on the said bill.

[4] Bills of exchange are taken as equivalent to deferred instalments of cash; therefore the law does not allow cross-claims or defences, except for such limited defences as fraud, invalidity or failure of consideration. As these limited defences had not been pleaded by D, there was no defence to D & C's claim.

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[D & C's appeal allowed.]

Case referred to:

Nova (Jersey) Knit Ltd. v. Kammugarn Spinnerei GmbH [1977] 2 All ER 463

Legislation referred to:

Bills of Exchange Act 1949, ss. 2, 3(1), 17(1), 38 (a), 47, 48

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Rules of the High Court 1980, O. 14

Other sources referred to:

The Supreme Court Practice 1985, Vol. 1, p. 144

For the Plaintiff/Appellant - L.T. Rasa-Ratnam; M/s. Skrine & Co.

For the Respondent - C.T. Lee; M/s. Lek Yan

JUDGMENT

Zakaria Yatim J:

This is an appeal by the plaintiff against the decision of the Senior Assistant Registrar, who refused to grant the plaintiff's application to sign final judgment against the defendant for a sum of RM306,428.34 together with interest on the principal sum of RM255,000 at 18% per annum from 3 October 1984 till date of final payment and costs.

The appeal was heard in chambers. After hearing the arguments of both Counsel for the plaintiff and the defendant I dismissed the appeal with costs. At the request of Counsel for the plaintiff I adjourned the matter into open Court for further argument.

According to the statement of claim the defendant was an acceptor of a bill of exchange No. KULBPM 83198 dated 21 March 1983 for a sum of RM255,000. The bill was drawn by Oriental Elastic Industries Company to mature on 18 August 1983 and indorsed by the said Oriental Elastic Industries Company to the plaintiff. The bill was presented to the defendant for payment but was dishonoured. The plaintiff protested. The plaintiff's claim against the defendant is for a sum of RM306,428.34 as at 2 October 1984 being the amount owing in respect of the bill which was dishonoured by the defendant. The particulars of the claim are as follows:

1. Principal amount due on		
18 August 1983	...	RM 255,000.00
2. Postage and stamp duty	...	RM 16.00
3. Interest at 13% per annum		
from 18 August 1983 to		
28 August 1983	...	RM 908.22
4. Interest at 18% per annum		
from 28 August 1983 to		
2 October 1984	...	RM 50,427.12
5. Notarial and disbursement		
charges	...	<u>RM 77.00</u>
Total		<u>RM306,428.34</u>
		=====

The plaintiff also claims interest on the principal sum at the rate of 18% per annum from 3 October 1984. The plaintiff, through its solicitors wrote an AR Registered letter on 11 October 1984 to the defendant demanding payment of the sum owing to the plaintiff by the defendant. But the defendant failed to pay the said sum or any part thereof.

In the statement of defence, the defendant denies all the allegations contained in the statement of claim. According to the defendant, the plaintiff had no capacity or title to bring the present action as plaintiff. Alternatively, the defendant contends that it was not given any notice of dishonour for non-payment in accordance with the provisions

- a* of the Bills of Exchange Act 1949. The defendant further contends that all its liabilities under the bill of exchange had been discharged by subsequent payments made by the defendant to the drawer of the bill during the period between 1 February 1984 and August 1984.

- b* It is clear that the plaintiff's claim arises from the bills of exchange referred to in the statement of claim. A copy of the said bills of exchange is exhibited to the affidavit of Mr. Wu Foong Chung affirmed on behalf of the plaintiff on 19 April 1985. The bill is dated 21 March 1983. On the bill it is written, at due date 18 August 1983 pay this first of exchange ... to the order of Development and Commercial Bank the sum of Ringgit: Two hundred fifty five thousand only. The bill is drawn by Oriental Elastic Industries Company and it is addressed to Brimal Sdn. Bhd., the defendant. It is not in dispute that this is a valid bill of exchange as envisaged in s. 3(1) of the Bills of Exchange Act 1949 (Revised 1978).
- c* The section states:

3(1) A bill of exchange is an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to, or to the order of, a specified person, or to bearer.

- d* The bill was duly presented to the defendant for payment on 14 May 1984 but it was dishonoured. This is stated in the note of protest dated 14 May 1984 signed by a notary public, which is exhibited to Wu Foong Chung's affidavit. The note of protest *inter alia* states:

- e* On Monday, 14 May 1984, I, Chin Yoong Chong, Notary Public, duly authorised under the Notaries Public Act 1959 and practicing at Kuala Lumpur, Federal Territory, at the request of Development and Commercial Bank Berhad Kuala Lumpur, the holder of the first of exchange dated 21 March 1983, did cause due and customary presentation to be made of the said first of exchange whereof a true copy is written on the reverse side unto Brimal Sdn. Bhd., Lot 3291 5¼ Miles, Jalan Kapar, Kelang, upon whom the same is drawn and by whom the same was accepted, during the usual business hours at the premises of Brimal Sdn. Bhd., aforesaid, and my clerk did exhibit the said first of exchange and demanded payment thereof to which Mr Tan Ooi Lee, the accountant made reply to the demand for payment in that he would not pay but said that the sum of RM126,000 had been paid to the suppliers and the balance would be paid as soon as possible.
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- From the note of protest, it is evident that the bill was duly presented to the defendant but the defendant refused to make payment. The bill was therefore dishonoured for non-payment under s. 47 of the Act.
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The bill was duly accepted by the defendant as shown on the copy of the bills of exchange.

- It is contended by the defendant that no notice of dishonour was given to him by the plaintiff. I think the plaintiff is under no obligation to give the defendant notice of dishonour. Under s. 48 of the Act, the plaintiff is only required to give notice of dishonour to the drawer of the bill. The section *inter alia* states:
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48. Subject to this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged:

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Provided that:

- (a) where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission;
- (b) where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of subsequent dishonour by non-payment unless the bill shall, in the meantime, have been accepted.

In the present case the drawer is not a party to the suit and the question of giving notice of dishonour to the drawer does not arise. In my view the defendant's contention that he was not given notice of dishonour is misconceived.

Although the bill was presented for payment about eight months after the date due for presentation, the question of delay has not been raised by the defendant. In any event the acceptance of the bill is the signification by the defendant of his assent to the order of the drawer. See s. 17(1) of the Act.

Under s. 38(a) of the Act one of the rights and powers of the holder of a bills of exchange is that he may sue on the bill in his own name. The word "holder" is defined in s. 2 as the payee or indorsee of a bills of exchange. The plaintiff is the holder of the said bills of exchange in the present case. As holder of the bills of exchange the plaintiff is therefore entitled to sue the defendant on the bill in the plaintiff's name.

The question for the Court to consider now is whether the plaintiff is entitled to enter summary judgment against the defendant under O. 14 of the Rules of the High Court 1980. The *Supreme Court Practice 1985*, Vol. 1, at p. 144 states:

In an action on a bills of exchange, the mere assertion by the defendant of fraud or illegality affecting the bill is not in itself enough to entitle him to leave to defend, but equally if the defendant sets out facts supporting a case of fraud or illegality affecting the bill, the mere assertion by the plaintiff that he took the bill in good faith and for value will not in itself deprive the defendant of his entitlement to leave to defend but if the plaintiff's claim to be a *bona fide* holder for value is uncontested or he can establish such claim by unchallenged or unchallengeable contemporary documents, the plaintiff is entitled to judgment. Bills of exchange are treated as cash and, unless there are exceptional circumstances, where there is an action between the immediate parties to a bill of exchange, judgment will not be held up by virtue of a counter claim by the defendant.

In *Nova (Jersey) Knit Ltd. v. Kammugarn Spinnerei GmbH* [1977] 2 All ER 463, Lord Wilberforce in his speech at p. 470 said:

When one person buys goods from another, it is often, one would think generally ... important for the seller to be sure of his price: he may (as indeed the appellants here have) bought the goods from someone else whom he has to pay. He may demand payment in cash; but if the buyer cannot provide this at once, he may agree to take bills of exchange payable at future dates. These are taken as equivalent to deferred instalments of cash. Unless they are to be treated as unconditionally payable instruments ... which the seller can negotiate for cash, the seller might just as well give credit. And it is for this reason that English law ... does not allow cross-claims, or defences except such limited defences as those based on fraud, invalidity, or failure of consideration, to be made. In my opinion, this is straightforward case of an action on bills, to which no admissible defence has been put forward.

a I respectfully agree with the passages quoted above. In the present case, neither fraud, nor illegality or failure of consideration has been pleaded in the statement of defence I have carefully considered the pleadings, the affidavits filed and the submissions of Counsel in this case and have come to the conclusion that the defendant has no defence to the plaintiff's claim.

b In the circumstances I set aside the order I made in chambers and allow the appeal with costs. I order that the plaintiff be at liberty to sign final judgment against the defendant for the sum of RM306,428.34 together with interest on the principal sum for RM255,000 at 18% per annum from 3 October 1984 till the date of judgment and thereafter at 8% per annum till the date of realisation.

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Also found at [1991] 2 CLJ 1514

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